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SUPREME COURT
FILED

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November 13, 2017

Chief Justice Tani G. Cantil-Sakauye and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: *Jameson v. Desta*, Cal. Supreme Court No. S230899
Supplemental Letter Brief of the Amicus Curiae Committee of the
California Commission on Access to Justice, Amicus Curiae

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Amicus Curiae Committee of the California Commission on Access to Justice¹ (Access Commission), amicus curiae, submits this supplemental letter brief in response to the Court’s order of October 11, 2017, authorizing amici curiae to address the following question:

What effect, if any, does the 2015 amendment to California Rules of Court², rule 3.55(7) and the accompanying Advisory Committee Comment have on the resolution of the issue presented by this case?

The Access Commission believes rule 3.55 is inapplicable to the question before the Court because the rule merely implements a Legislative minimum fee-waiver mandate; it does not (and cannot) prohibit the Supreme Court from determining that due process requires greater protection than the Legislature prescribed. To the extent the rule could be construed to allow a superior court to create a policy that effectively creates a blanket denial of the right of indigent litigants to an appeal, such a construction would violate legislative intent behind the fee-waiver program, and would be unconstitutional.

¹ This brief is submitted on behalf of the Amicus Curiae Committee of the California Commission on Access to Justice. The views expressed shall not be imputed to or be deemed to represent any of the Access Commission’s appointing authorities, including but not limited to the State Bar of California.

² All references herein to “rule” or “rules” are to those specified in the California Rules of Court.

- 1. Rule 3.55 only ensures Legislatively-mandated fee waivers are granted; it does not proscribe additional fee waivers this Court may determine are necessary to ensure due process or the fair administration of justice.**

Rule 3.55 is expressed in mandatory terms:

Court fees and costs that *must* be waived include... [¶][r]eporter's fees for attendance at hearings and trials, if the reporter is provided by the court.

(Rule 3.55 (emphasis added).) The appended Advisory Committee comment confirms that rule 3.55(7) was only intended to implement the affirmative fee-waiver mandates of the Government Code:

The inclusion of court reporter's fees in the fees waived upon granting an application for an initial fee waiver is not intended to mandate that a court reporter be provided for all fee waiver recipients. Rather, it is intended to include within a waiver all fees mandated under the Government Code for the cost of court reporting services provided by a court.

(Advisory Com. com, Cal. Rules of Court, rule 3.55, emphasis added.)

The Advisory Committee's assessment of the pertinent statutory provision, Government Code³ section 68086, is correct—that statute does not require courts to include in the initial fee waiver the cost of court reporters that are not provided by the court. But the statute does not prohibit a waiver of such reporters' fees either. It merely sets forth the Legislature's minimum requirements.

As Amici California Academy of Appellate Lawyers et al, correctly note, rule 3.56(5) reflects the Judicial Council's agreement that the waivers articulated in rule 3.55 are not exclusive, and under rule 3.56, the superior courts retain discretion to include additional fees and costs requested in the application.

Rule 3.55 is therefore not instructive on the question before the Court. Whether the San Diego Superior Court's policy violates principles of due process, equal protection, or this Court's assessment of whether the equal and fair administration of justice requires additional protection of indigent litigants beyond those mandated by the Legislature are not addressed in the rules. The Court's inquiry in its order for supplemental briefing may therefore end here. Nevertheless, several additional points warrant consideration.

³ Unless otherwise specified, all statutory references are to the California Government Code.

- 2. Rule 3.55 cannot be construed to authorize a superior court to negate indigent litigants' right to fee waivers by instituting a blanket policy of not providing court reporters, because that construction would render the rule inconsistent with the intent of sections 68086 and 68630, and could not be squared with Constitutional due process and equal protection.**

The Judicial Council is not unconstrained in promulgating rules for the administration of justice. Specifically, rules of court may not be inconsistent with Legislative enactments.

To improve the administration of justice the council shall ... adopt rules for court administration, practice and procedure, and perform other functions prescribed by statute. The rules adopted shall not be inconsistent with statute.

(Cal. Const., art. VI, § 6.) Unquestionably, neither may court rules be inconsistent with the Constitution. (See U.S. Constitution, Article VI, "The Constitution, ... shall be the supreme law of the land; and judges in every state shall be bound thereby....")

Section 68086 and rule 3.55(7) draw a practical distinction between fees for services the court has procured and fees for services the parties themselves have procured. As to court reporters, the statute and the rule waive an indigent party's obligation to reimburse the court for its outlay, but they do not require a court to reimburse an indigent party's expense in procuring a court reporter when the court has not. The statute (and therefore the rule) recognizes a modicum of administrative flexibility, and perhaps the desire allow courts to avoid wasting resources by retaining reporters to sit idly when not reasonably needed. However, that limited exception cannot fairly be interpreted to allow a blanket end-run of the section 68086's clear intent that persons entitled to fee waivers should be provided court reporters' services free of charge.

The superior court is a "court of record." (Cal. Const., art. VI, § 1.) A "court of record" is "a judicial tribunal having attributes and exercising functions independently of the person of the magistrate designated generally to hold it, and proceedings according to the course of the common law." (See *Ex parte Thistleton* (1877) 52 Cal. 220, 224-225 (emphasis omitted).) "The foregoing implies a written record...." (*Ibid.*) Such courts acts and judicial proceedings are recorded and have the power to fine or imprison. (*Ibid.*) Without doubt one of the customary essential services the superior courts provide, as a court of record, is a means of generating a record of proceedings, typically by providing court reporters to render the services. Like the bailiff who ensures security and order in the courtroom, and the clerk who manages the files for the court, the court reporter (or at least the record he or she generates) serves a judicial function just as essential to the integrity of the judicial

process. The record protects *all* parties' right to appellate review. The record facilitates the trial judge's, jury's, and counsels' recollection of prior testimony. The record protects judicial officers from unfounded allegations of misconduct.⁴ The record ensures that the law being applied by individual judges in their respective courtrooms continues to develop and does so under the supervision of the appellate courts. The legislature recognized the importance of having a record and codified a right to one in superior courts by mandating that a reporter "shall take down in shorthand all testimony, objections made, rulings of the court, ... in a civil case, on the order of the court or at the request of a party." (Code Civ. Proc., § 269, subd. (a)(1)).

So important is the function of a record in the administration of justice that the Government Code requires that where a reporter is not available for a particular proceeding, any party is entitled to hire a court reporter for the proceeding. But in those circumstances, the court reporter is not a private reporter. Rather, the reporter becomes the official pro tem reporter of the court:

[I]f 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....

(§ 68086, subd. (d)(2).⁵) Irrespective of whether the court or either of the parties procures the reporter, the reporter nevertheless remains *the court's* reporter.

⁴ The concerns we raise from the absence of a record are not novel. We respectfully refer the Court to the Report to the Chief Justice, by the Commission on the Future of California's Court System (2017), Chapter 5, Recommendation 7 and the associated rationale, pp. 238-251, (<http://www.courts.ca.gov/documents/futures-commission-final-report.pdf>), which contains a comprehensive analysis of the history and trends of court-reporting services, the budgetary constraints to which the decision to forego hiring court reporters has been attributed, reference to the due-process and equal-protection implications of the inability of the indigent to obtain a record (including a specific reference to among others this very case (*Jameson v. Desta*, cited at fn. 142), and Legislative enactments that prohibit the judiciary from pursuing less expensive and more efficient means of generating a record (such as the prohibition on broad use of electronic records). The report concludes a pilot project ought to be initiated to use comprehensive digital recording to create the official record for all case types that do not currently require a record prepared by a stenographic court reporter.

⁵ The final clause of subdivision (d)(2), replaced above with ellipses, renders "the costs [for the official pro tempore reporter] recoverable as provided in subdivision (c)," i.e., "recoverable as taxable costs by the prevailing party" in like manner as a court-procured reporter. (§ 68086, subd. (c).) As both the official reporter and official pro tempore

We recognize the budgetary constraints placed upon the Judiciary over the last decade. But the effect of the San Diego Superior Court’s policy has an unjustifiable impact prejudicing only those litigants whom the Legislature decided should be entitled to fee waivers. The statute’s intent was to promote access, yet the policy in question denies access, and defeats the right to meaningful appellate review, but only for those who cannot afford the counsel to advise them of the significance of a record, and those without the means of paying for a reporter to generate a record. If the Equal Protection Clause means anything it must mean that superior courts’ budgetary decisions must affect all litigants equally, and not prejudice only those without the means to pay. (See U.S. Const., 14th Amend.)

The Legislature created the fee-waiver program as a means to provide some mitigation of the effects that the disparity in the parties’ wealth has upon the judicial process by conferring upon qualified litigants a right to a fee waiver.

The Legislature finds and declares [. . . ¶ 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. California law and court procedures should ensure that court fees are not a barrier to court access for those with insufficient economic means to pay those fees.

(§ 68630, subd. (a).)

Like all vested rights, this right cannot be taken without due process of law. (See *Town of Rock Castle, Colo. v. Gonzales* (2005) 545 U.S. 748, 756 (explaining that a benefit provided by statute is property interest protected by the due process clause if the party asserting it has a claim of entitlement to it.) In that respect, we note that section 68086’s above-quoted exception speaks in terms of the “availability” of a court reporter. It does not confer upon a superior court the power to decide to render court reporters “not available” by choosing not to fund them in certain departments, and thereby deny eligible indigent litigants the benefits of the fee-waiver program that the Legislature intended they should receive.

The Legislature finds and declares [. . . ¶ t]hat fiscal responsibility should be tempered with concern for litigants’ rights to access the justice system. The procedure for allowing the poor to use court services without paying ordinary fees must be one that applies rules fairly to similarly situated persons, is accessible to those with limited knowledge of court processes, and does not

reporters’ costs are equally taxable, the clause omitted from (d)(2) is not relevant to the fee-waiver issue in this proceeding.

delay access to court services. The procedure for determining if a litigant may file a lawsuit without paying a fee must not interfere with court access for those without the financial means to do so.

(§ 68630, subd. (b).)

We intend no disrespect to the superior court, and we do not here suggest the superior court's budgetary choices are arbitrary. The Access Commission knows better than most which Californians have suffered the greatest harm from the budget cuts to the Judiciary precipitated by the recession. We do however believe that the budgetary choices of individual superior courts present an arbitrary basis to determine which litigants shall have the right of appeal and which shall not. And, those budgetary determinations were undeniably made in the absence of any consideration of any particular litigant's position—this Legislative entitlement was taken from eligible litigants without due process of law, and it has been taken unequally across California. Furthermore, no compelling governmental interest exists for a county superior court to balance its budget through budget choices that deny only the indigent due process of law by denying access to a record of court proceedings which effectively takes away an indigent party's right of appeal. No compelling governmental interest exists to create disparate due-process rights for indigent litigants depending upon the county in which they reside or where their action is properly venued. And, no compelling governmental interest exists to create incentives across California for parties to use their opponent's inability to obtain a record as a litigation strategy in actions where venue is discretionary.

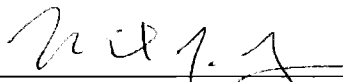
While we fully endorse the Futures Commission's recommendation to institute a pilot program for creation of an electronic record in courts lacking reporters (see footnote 4, *supra*), such a project is far too remote for Mr. Jameson and the countless others denied due process by the status quo in the interim. At root, access to justice is about more than fundamental fairness—it is about ensuring our government maintains the basic respect of its citizens that enables them to yield their personal liberties to the Rule of Law. That respect cannot exist without a fair opportunity to be heard throughout a party's litigation.

Amici California Academy of Appellate Lawyers, et al, note that rule 3.56(5) provides a basis to excuse indigent litigants of fees for reporters not procured by the court. The Access Commission would emphasize that the discretion afforded by rule 3.56 should not be construed to create a basis for superior courts to deny such requests when granting them is necessary to ensuring due process, by affording indigent parties a record for appeal.

The fair and equal administration of justice requires that litigants in all parts of the state, irrespective of financial means, all have equal right to appellate review. To the extent rules 3.55 or 3.56 could be interpreted to allow a superior court to adopt a policy that operates to the contrary, or denies vested rights based upon the county where an indigent party is in civil litigation, the rules would be unconstitutional. For the reasons above and as set forth in the California Academy of Appellate Lawyers' amicus brief dated July 28, 2017, this Court should reverse the decision of the court of appeal, and grant to Mr. Jameson such further relief as is just.

Respectfully submitted,

**AMICUS CURIAE COMMITTEE OF THE
CALIFORNIA COMMISSION ON ACCESS TO JUSTICE**

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