Case No. **S230899**

IN THE SUPREME COURT OF CALIFORNIA

BARRY S. JAMESON,

PLAINTIFF AND PETITIONER,

V.

TADDESE DESTA,

DEFENDANT AND RESPONDENT.

SUPREME COURT
FILED

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After a Decision by the Court of Appeal, Fourth Appellate 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

PETITIONER BARRY S. JAMESON'S OPENING BRIEF ON THE MERITS

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INTRODUCTION

In 2002, plaintiff Barry Jameson—indigent, incarcerated, and representing himself—sued Defendant Dr. 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 finally on the cusp of bringing 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 also deprived Jameson of any effective remedy in 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 services for all 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 meaningless any bene-

fit that the Legislature bestowed in enacting section 68086, subdivision (b).

The Court of Appeal affirmed in full. (*Jameson v. Desta* (2015) 241 Cal.App.4th 491, 495 (*Jameson IV*).) 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." (*Id.* at pp. 502–03.) The court ruled that under such circumstances, every litigant, even an indigent one, must arrange and pay for the services of a private reporter *pro tempore*, under Rules of Court, rule 2.956. (*Id.*) 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 any civil trial, 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 pp. 503–04.).

The Court of Appeal's ruling cannot stand. California law requires the courts of this state to exercise their discretion in order to protect the rights of indigent and imprisoned litigants to access the courts, including the right to effectively appeal. Other than the trial court's own policy, no statute or rule permitted—much less required—the trial court to deprive Jameson of access to an official court reporter. Under the circumstances, by failing to take appropriate measures to ensure Jameson's access to the courts, the trial court abused its discretion, and significantly prejudiced Jameson.

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 Code § 68086 subdivision (b) to waive reporter's fees for fee waiver litigants?

2. Legislatively established policy and longstanding precedent from this Court require 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?

STATEMENT OF THE CASE

I. Jameson's Fourteen-Year Odyssey Through the Courts.

In 2002, Jameson sued Desta, a prison doctor, in San Diego Superior Court, alleging negligent medical treatment for Hepatitis C while Mr. Jameson was incarcerated. (*Jameson IV*, *supra*, 241 Cal.App.4th at p. 494.) The operative counts of his complaint litigated by the parties allege medical negligence and breach of fiduciary duty through lack of informed consent. (*Id.* at pp. 495–96.)

Over the next thirteen years, Jameson's case followed a circuitous but predictable course. 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. (*Jameson v. Desta* (July 2, 2007, D047824), 2007 WL 1885104 at *2 opn. mod. July 26, 2007 [nonpub. opn.] (*Jameson I*).) But three years earlier, Desta had signed a "notice and acknowledgement of receipt indicating that he had been served with a summons and a complaint." (*Id.* at *6) The Court of Appeal reversed in an unpublished opinion. (*Id.* at *9.)

On remand, the superior court again dismissed when Jameson—still incarcerated—failed to appear at a telephonic case management conference. (*Jameson v. Desta* (2009) 179 Cal.App.4th 672, 674 (*Jameson II*).) But the evidence showed that Jameson's nonappearance resulted from prison officials denying him access to the telephone. (*Id.* at pp. 681–83.) The Court of Appeal again reversed, holding that the superior court had abused

its discretion by depriving Jameson of "meaningful access to the courts." (*Id.* at 683.)

On a second remand, the superior court granted summary judgment in favor of Desta, finding that Jameson had not come forward with evidence to raise triable issues as to causation. (*Jameson v. Desta* (2013) 215 Cal.App.4th 1144, 1148 (*Jameson III*).) The Court of Appeal reversed a third time. (*Id.* at 1149.) On the merits, it ruled that Desta failed to meet his initial burden on Jameson's informed 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. (*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 231–32.) 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 for civil trials, and that the parties have to provide their own court reporters for trial." [1] (*Ibid.*) After trial was continued twice to address pending motions (RA 250–51, 252–53), a civil jury trial commenced on April 28, 2014. (RA 254.)

After an 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.[2] After giving his own opening statement, Desta moved for nonsuit. (RA 257, *see Jameson IV*, *supra*, 241 Cal.App.4th at p. 497.) 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 Jameson IV*, *supra*, 241 Cal.App.4th at pp. 503–04), 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 re-

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[1] The hearing itself was not reported. (RA 231.) This minute order is the only reference in the record that the superior court would not be providing a reporter.

[2] 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.

spect to both the standard of care and causation."].) Judgment was entered on July 31, 2014. (RA 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.'" (*Jameson IV*, *supra*, 241 Cal.App.4th at p. 500 [quoting RA 232].)[3] Indeed, since 2013, as a matter of official court policy, the San Diego Superior Court has not provided official court reporters 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*.)[4] The policy affords no exceptions for indigent litigants, even when they have qualified for a fee waiver and have no other way to pay for a record. (*See* S.D. Super. Ct. Form ADM-315, *Official Reporter Pro Tempore Policy* at 2.)[5] 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*

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[3] The hearing occurred on April 18, 2014, which was only three days before the scheduled onset of the trial. (*See* RA 231–32.) 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.

[4] Attached as Ex. A, per Rules of Court, rule 8.520(h).

[5] Attached as Ex. B, per Rules of Court, rule 8.520(h).

> *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).

The trial court's policy left Jameson without recourse. 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 of oral proceedings for appeal. By outsourcing *all* civil trial reporting to private reporters, the trial court has rendered it effectively *impossible* for an indigent civil litigant like Jameson to create a trial record, fee waiver or not.

III. The 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. (*Jameson IV*, *supra*, 241 Cal.App.4th at pp. 504–05.) 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 any of these arguments, holding that "none of [them are] cog-

nizable in the absence of a reporter's transcript." (*Id.* at 505.) Citing an earlier case, the court explained that "a[n] appellant who fails to provide a reporter's transcript on appeal is precluded 'from raising any evidentiary issues on appeal.'" (*Id.* at 504 [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." (*Ibid.*)

As to why Jameson lacked the record he needed to preserve his appeal, he 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 [Government Code] section 68086(b)[6]—which requires that a court reporter's fee "shall be waived for a person who has been granted a fee waiver under Section 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 trial 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 Rules of Court, rule 2.956, which

addresses the court's obligation to provide notice of the unavailability of official reporters. (*Jameson IV, supra*, 241 Cal.App.4th at p. 502 & fn.10.) And as to Jameson's right to a free reporter, the court held that section 68086(b) requires only to a waiver of appearance fees for *official reporters*. (*Id.* at p. 503.) According to the court, it does not, however, require a free reporter when the superior court declines to provide any official reporters at all, and instead requires all parties—pecunious and poor alike—to secure the services of private reporters *pro tempore*. (*Ibid.*) Relying on Rules 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 indigent litigant who has been granted a fee waiver. (*Ibid.*)[7]

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. 495.) On October 20, 2015, the acting presiding justice on the panel ordered the opinion certified for publication. The court's decision became final on November 19, 2015. (Cal. Rules of Court, rule 8.264(b)(3).)

Jameson filed a timely petition for review on December 1, 2015, which the Court granted on January 27, 2016.

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6 Any further references to "section 68086" are to the Government Code.

7 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.)

THE COURT OF APPEAL'S DECISION MUST BE REVERSED

As explained below, this Court has often been presented with the question of when—the statutes on the subject being silent—courts can imply exceptions to mandatory court fees for *in forma pauperis* litigants. Over the past hundred years, it has repeatedly answered that question with an emphatic "yes." This case, in contrast, presents an easier question. Here, in section 68086, subdivision (b), the Legislature has affirmatively determined that *in forma pauperis* litigants are entitled to the waiver of a court reporter's appearance fee. Can California's courts nonetheless evade that obligation and effectively deprive these litigants of an appellate record by outsourcing all civil reporting to private reporters who charge an appearance fee to all litigants, rich and poor alike? The answer, resoundingly, is "no."

California law recognizes that poor and imprisoned litigants have a fundamental right to access the courts, including the appellate process. Under well-established principles, the courts of this state must exercise their discretion in crafting procedures sufficient to vindicate that right. Although the trial court in this case had means within its discretion to ensure the presence of a reporter at Jameson's trial to create a record for appeal, it took no steps at all to preserve Jameson's access to an appeal. Indeed, it has essentially tied its own hands by enacting a court-wide policy that makes it practically *impossible* for any fee-waiver litigant to obtain court reporting services at his civil trial. In doing so, the trial court ran afoul of the clear policies of this state and abused its discretion in denying Jameson access to the courts.

I. California 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 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, as the Court of Appeal recognized in *Jameson II*, California law specifically affords prisoners "a statutory right to initiate civil actions." (*Jameson II, supra*, 179 Cal.App.4th 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 lengthy and proud lineage in the decisions of this Court. Nearly a century ago, the Court held that

California courts have an inherent equitable power to permit 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 (*Baltayan*) (conc. 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 statutory jury fees, even though the statute afforded no express exception. (*Majors v. Superior Court* (1919) 181 Cal. 270, 274 (*Majors*).) Later decisions 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]).[8]

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 pertinent fee statutes neither permitted nor prohibited courts from waiving filing fees on ap-

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[8] *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].

peal. (*Id.* at 656.) Relying on both common law courts' historical exercise of "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*, the Court held that California courts inherently possess the authority to grant waivers. (*Id.* at pp. 654–56.) Importantly, in examining the rationale for requiring filing fees, the Court explained that "the legitimate purposes of providing financial support for our courts and discouraging frivolous or unnecessary litigation . . . do not require us to deprive indigents of access to the appellate courts." (*Id.* at 657.)

Ferguson was not ultimately called upon to 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 & fn.3; *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 contained in a 1930 Court of Appeal decision that declined to grant a writ ordering a trial court to afford 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."].)[9]

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*); *see also March v. Municipal Court* (1972) 7 Cal.3d 422, 430) 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.*)

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[9] *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.