

23-6307

In the Supreme Court of the United States

VERONICA MCCLUSKEY,

Petitioner

Sup. Ct.

DEC 11 2003

OFFICE OF THE CLERK

v.

WILLIAM AND ROXANNE HENDRICKS.

Respondents

On Petition for a Writ of Certiorari to the
Supreme Court Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Court Should Grant Review To Clarify Whether The Trial Court Committed Reversible Error In Not Granting Respondent A Jury Trial In The First Instance
2. Whether Petitioner's Due Process Rights Were Violated When The Trial Court Prevented Petitioner From A Fair Hearing In Limiting Cross-Examination Of William Hendricks Illegal Conduct
3. An Important Question Exists Whether Petitioner's Due Process Rights Were Violated When The Trial Court Limited Cross Examination Of William Hendricks

PARTIES TO THE PROCEEDING

Veronica Mccluskey, Petitioner here, was appellant and objector below. Respondents William Hendricks and Roxanne Hendricks were appellees below.

RELATED PROCEEDINGS

No such proceedings exist.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Veronica McCluskey prays that a writ of certiorari be granted to review the judgment and orders entered by the Los Angeles Superior Court which were affirmed on appeal.

OPINIONS BELOW

The opinion of the California Court of Appeals and orders denying Petitioners Petition For Review With the California Supreme Court is attached to this petition as an Appendix.

JURISDICTION

The Order Denying Petitioner's Petition For Review With the California Supreme Court is attached. *See* Appendix. This petition is filed within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1257.

**PERTINENT CONSTITUTIONAL AND
STATUTORY PROVISION**

U.S. Const. amend. VII, U.S. Const., 14th Amend., §1

INTRODUCTION

Veronica McCluskey ("Petitioner") seeks review of her Trial Court and Appellate decision where the California Supreme Court then subsequently denied her petition for review.

Petitioner was denied a jury trial but had paid her initial jury fee deposit in early 2018 and requested a jury trial in the first instance thus when the trial court denied Petitioner her right to a jury trial this was reversible error. *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App. 4th 11, 50. The right to a jury trial in a civil lawsuit is fundamental. *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937). The Seventh Amendment guarantees the right to a trial by jury for a legal claim in a civil action. U.S. Const. amend. VII. Despite such constitutional right to a jury trial Petitioner was denied such right after multiple requests.

These questions call urgently for this Court's review and guidance.

STATEMENT OF THE CASE

A. Factual Background

Williama and Roxanne Hendricks (Respondents), who are married, lived in Iowa and owned an apartment in Los Angeles that they rented out on a short term basis through Airbnb. In May 2017, Petitioner agreed to act as their cohost. *McCluskey v. Hendricks*, B292470 (Opinion p. 2.) In that role, she prepared the apartment for new

guests. (Opinion p. 2.) In early June 2017, William was addicted to opiate pain pills and he sometimes had pills delivered to locations where he was traveling. (Opinion p. 2.) Because William planned to be traveling to Los Angeles, he arranged to have pills mailed to the apartment. (Opinion p. 2.)

On June 6, 2017, Petitioner mistakenly opened a package addressed to William containing pills; she and William had a text exchange about it, in which William apologized and said that he would make arrangements for the pills to be removed from the apartment by someone else. (Opinion p. 3.) “Soon after, [the parties’] relationship deteriorated because [Petitioner] was not getting paid through Airbnb. Also, [Petitioner] accused [William] of making derogatory comments about her to customers. She ended their business relationship and texted that she would forward everything to Airbnb.” (Opinion p. 3.)

B. Procedural History

Trial Court

Petitioner filed her complaint and a stay of all trial court proceedings commenced while Petitioner appealed denial of her anti-SLAPP motion between September 5, 2018 and February 26, 2020. Petitioner paid her initial jury fee deposit in early 2018 and requested a jury trial in the first instance which request was not granted. Respondents filed a summary judgment motion and the trial court granted summary adjudication motion on nine of ten claims. Petitioner also filed an ex-parte application

in March 2021 requesting a jury trial or relief from any waiver, and the Trial Court denied such request.

After Petitioner presented her case at a bench trial for defamation claim the Trial Court granted Respondents oral motion for judgment under Cal. Civ. Pro. 631.8. The Trial Court granted an \$800,000 judgment in favor of Respondent Mr. Hendricks after a bench trial on the cross-complaint.

B. California Court Of Appeals

The California Court Of Appeals affirmed the orders of the trial court. The Opinion addressed two appeals filed by Petitioner which were consolidated.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant Review To Clarify Whether The Trial Court Committed Reversible Error In Not Granting Respondent A Jury Trial In The First Instance

Petitioner was denied a jury trial but had paid her initial jury fee deposit early 2018 and requested a jury trial in the first instance thus when the trial court denied Petitioner her right to a jury trial this was reversible error. *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App. 4th 11, 50. Even had Petitioner intentionally waived her right to a jury trial, when she filed an ex-parte application in March 2021 requesting a jury trial or relief from any waiver, the Trial Court abused its discretion not granting such request.

A "[t]rial by jury is an inviolate right and shall be secured to all," but "[i]n a civil cause a jury may be waived by the consent of the parties expressed as prescribed by statute." Cal. Const., art. I, §16. A party waives the right to a jury trial by failing to timely deposit jury fees. C.C.P. §631(f)(5). A court may refuse a jury trial if jury fees are not deposited as required by §631, and litigants are not thereby deprived of any constitutional right. *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 388(*Still*). Section 631(b) states: At least one party demanding a jury on each side of a civil case shall pay a nonrefundable fee of \$150 unless the fee has been paid by another party on same side of the case. In *TriCoast Builders, Inc. v. Fonnegra*, currently published at 74 Cal.App.5th 239(2022), a jury trial between TriCoast and Fonnegra was scheduled to begin September 23, 2019 when on that day, Fonnegra waived jury trial. *TriCoast* at 244. TriCoast objected, made an oral request to proceed by jury trial, and offered to immediately post jury fees. *Id.* The Appellate Court concluded the trial court did not abuse its discretion concluding TriCoast's request for a jury and offer to post jury fees the day of trial was untimely. *Id.* at 250

A trial court's discretionary decision to grant or deny relief under §631(g) will not be disturbed absent abuse of discretion. *McIntosh v. Bowman* (1984) 151 Cal.App.3d 357, 363(*McIntosh*). If a party waived the right to a jury trial under §631(g), the statute gives the trial court discretion to grant relief from waiver: "The court may, in its discretion upon just terms, allow a trial by jury although there may have been a waiver of a trial by jury." "In exercising

its discretion, the trial court may consider delay in rescheduling jury trial, lack of funds, timeliness of the request and prejudice to the litigants." *Gann v. Williams Brothers Realty, Inc.* (1991) 231 Cal.App.3d 1698, 1704 (*Gann*). Prejudice to the court or its calendar are also relevant considerations. *Id.* *Wharton v. Superior Court* (1991) 231 Cal.App.3d 100, 104 (*Wharton*); *Glogau v. Hagan* (1951) 107 Cal.App.2d 313, 318 (*Glogau*).

Petitioner also demonstrated prejudice. A writ of mandate is the proper remedy to secure a jury trial allegedly wrongfully withheld. *Byram v. Superior Court* (1977) 74 Cal.App.3d 648, 654 (*Byram*); *Gann*, 231 Cal.App.3d at 1704; *Winston v. Superior Court* (1987) 196 Cal.App.3d 600, 603 (*Winston*). A party who fails to seek writ review of an order denying relief from jury waiver under §631 must demonstrate actual prejudice when challenging an order after the trial concluded. *Byram*, at 653; *McIntosh*, at 363. Reversal of the court's refusal to allow a jury trial after a trial to the court would require reversal of the judgment and a new trial. It is then reasonable to require a showing of actual prejudice on the record to overcome the presumption that a fair trial was had and prejudice will not be presumed from the fact that trial was to the court or to a jury. *Byram*, at 653. While noting that such a showing may be difficult, the *Gann* court endorsed this view. *Gann* at 1704.

The court in *Mackovska v. Viewcrest Road Properties LLC* (2019) 40 Cal.App.5th 1 (*Mackovska*), rejected the *Byram*, *McIntosh* and *Gann* courts' conclusion that prejudice must be shown by an Petitioner who failed to seek writ review of an order

denying relief from jury waiver. The *Mackovska* court emphasized the "the inviolate nature" of the constitutional right to a jury trial (*Mackovska* pp. 12-17), but conflated denial of the right to a jury trial in the first instance, absent any prior waiver, with denial of a motion for relief from a jury trial waiver. *Id.* The two circumstances are not the same. The California Constitution recognizes trial by jury as "an inviolate right," but explicitly states that that right may be waived "as prescribed by statute." Cal. Const., art. I, §16. Section 631 states a party waives the right to a jury trial by failing to timely deposit jury fees and makes relief from such waiver within the trial court's discretion. §631, (f)(5),(g). A trial court's discretionary decision to deny relief when jury fees have not been deposited as required by §631 does not deprive the litigants of any constitutional right. *Still*, 21 Cal.App.3d at 388. However Petitioner timely paid her jury deposit and requested a jury trial in the first instance thus denial of a jury trial was unconstitutional.

Other appellate courts have reversed judgments following refusal to grant relief from a jury waiver without requiring a showing of actual prejudice. *Boal v. Price Waterhouse & Co.* (1985) 165 Cal.App.3d 806, 810-811(*Boal*); *Bishop v. Anderson* (1980) 101 Cal.App.3d 821, 823-825 (*Bishop*); *Massie v. AAR Western Skyways, Inc.* (1992) 4 Cal.App.4th 405, 412(*Massie*). The courts in these cases do not, however, address the *Byram*, *Gann* and *McIntosh* line of authority requiring parties proceed via writ of mandate to challenge the allegedly wrongful denial of a jury trial. These cases all involved inadvertent

(not intentional) waiver of a jury trial thus are similar to Petitioner's case.

The *Mackouska* court asserted that the principle articulated in *Gann*, *McIntosh* and *Byram* that courts will not presume prejudice from denial of relief from jury waiver because we assume a party had the benefit of a fair and impartial court trial is based faulty case law that courts have misapplied and adopted. *Mackouska*, 40 Cal.App.5th at 14. Courts misapplied and repeated "questionable statement[s]" in "cases that were tried to a jury instead of the court after the plaintiffs had waived their right to a jury trial." Id. Of the cases cited in *Mackouska* supporting this assertion, only two—*Doll v. Anderson* (1865) 27 Cal. 248 and *Oakes v. McCarthy Co.* (1968) 267 Cal.App.2d 231, 265 (*Oakes*)—involved claimed error in having a jury trial rather than court trial, and the court in *Oakes* found there had been no waiver of a jury. *Oakes* at 265. Other cases cited in *Mackouska*, *Glogau*, 107 Cal.App.2d 313, and *Harmon v. Hopkins* (1931) 116 Cal.App. 184, rejected a claim of presumed prejudicial error because of a court trial rather than a trial by jury, as did *Gann*, 231 Cal.App.3d at 1704-1705, *McIntosh*, 151 Cal.App.3d at 363-364.

Both parties in *Oakes* demanded a jury trial at the pretrial conference, and although the plaintiff waived the right to a jury the day of trial, defendant did not. *Oakes*, 267 Cal.App.2d at 265. Cases cited in *Mackouska* as support for the premise that no showing of prejudice should be required in a posttrial challenge to denial of relief from jury waiver are inapposite. *Mackouska*, 40 Cal.App.5th at 15. The cases cited do not address relief from a prior jury

waiver, but denial of the right to a jury trial in the first instance. Id. at 16; *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.* (2017) 8 Cal.App.5th 1, 18-19,[acknowledging that courts require a showing of prejudice "in the prior waiver context when a party appeals after losing a court trial, rather than seeking immediate writ review of the order denying relief from waiver, ... [b]ut...here, no valid waiver has occurred and a trial court has 'denied [a party] its constitutional right to a [jury] trial in the first instance']; *Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 493[because no waiver occurred under any of the six means specified in §631, Petitioner was denied right to a jury trial in the first instance].) Even if this Court agrees with the courts in *Byram*, *McIntosh* and *Gann* that a party who did not seek writ review of an order denying relief from jury waiver under §631 must demonstrate actual prejudice when challenging the order on appeal, this is not controlling as Petitioner requested a jury trial in the first instance and timely paid her jury deposit. Requiring Petitioner to show actual prejudice would deprive her of a constitutional right to a jury trial. Petitioner also requested a jury trial ex-parte in March 2021 and June 2021 and was denied each time.

Petitioner's request was also timely. Even if there was evidence Petitioner waived a jury trial, the timeliness of Petitioner's request offers proof the trial court's denial of relief under §631(g) was an abuse of discretion. The timeliness of a request for relief from jury waiver is a factor the court may consider when exercising its discretion under

§631(g). *Gann*, 231 Cal.App.3d at 1704. Courts have denied as untimely requests for relief made on or near the day of trial. *Still*, 21 Cal.App.3d at pp. 387-388 [no abuse of discretion in denying request for relief from jury waiver made on the morning of trial]; *Sidney v. Rotblatt* (1956) 142 Cal.App.2d 453, 455-456 [affirming denial of request for relief made at outset of trial]; *Gann*, 231 Cal.App.3d at 1704-1705 [no abuse of discretion in denying request for relief from jury waiver made five days before trial]. Petitioner posted her jury fees several years before trial. Even if this Court concludes she waived any right to a jury trial until March 2021, this was well before the trial date. See *Simmons v. Prudential Ins. Co.* (1981) 123 Cal.App.3d 833 and *Bishop*, 101 Cal.App.3d 821, in which the courts held that denial of a request for relief from jury waiver the day of trial was an abuse of discretion. In *Bishop*, the respondent's attorney "candidly admitted" that his client's rights would not be prejudiced by a jury trial. *Bishop* at 824. The court in *Simmons* based its reversal in part on the trial court's failure to comply with a statutory mandate in effect at the time requiring the court to provide parties with 10 days' written notice of a jury trial waiver and to continue the trial if necessary to allow notice. *Simmons* at 838.

There was no prejudice to Respondents. Petitioner requested a jury trial in the first instance, she did once again several months before trial and also a week before trial. See *Boal*, 165 Cal.App.3d 806, in which the court stated: "[I]t is well settled that, in light of the public policy favoring trial by jury, a motion to be relieved of a jury waiver should

be granted unless, and except, where granting such a motion would work serious hardship to the objecting party." *Id.* at 809. That principle has been applied by courts more narrowly—where the party seeking relief mistakenly waived a jury trial. In *Boal*, the plaintiff gave notice during pretrial proceedings that he desired a jury trial. In subsequent proceedings, plaintiff was represented by new counsel unaware his client previously requested a jury trial, and mistakenly marked a form indicating jury waiver. *Id.*; see *Tesoro del Valle Master Homeowners Assn v. Griffin* (2011) 200 Cal.App.4th 619, 628, 638 (*Tesoro*)[mistake in late posting of jury fees because of conflicting statutes]; *Johnson-Stovall v. Superior Court* (1993) 17 Cal.App.4th 808, 810[plaintiff requested a jury trial in its case management statement but did not timely post jury fees]; *Massie*, 4 Cal.App.4th at 412[untimely posting of jury fees attributable to party's unfamiliarity with local court rule]; *Gann*, 231 Cal.App.3d at 1704, [court abuses its discretion in denying relief where there has been no prejudice to the other party or to the court from an inadvertent waiver]; *Wharton*, 231 Cal.App.3d at 104[failure to timely deposit jury fees resulting from confusion concerning the proper amount to be posted]; *Winston*, 196 Cal.App.3d at 602[inadvertent waiver shown where failure to post fees occurred from inconsistency in timing requirement among statutes]; *Byram*, 74 Cal.App.3d at 654[inadvertent waiver when attorney relied on his secretary to deposit jury fee and she failed to]; *March v. Pettis* (1977) 66 Cal.App.3d 473, 479-480[relief provisions of §631 protect against unknowing waivers, not express waivers].

Some courts suggest the opposing party bears the burden of demonstrating prejudice from the granting of relief from waiver. See *Tesoro*, 200 Cal.App.4th at 639; *Johnson-Stovall*, 17 Cal.App.4th at pp. 811-812; *Massie*, 4 Cal.App.4th at 411 and Respondent s failed to meet any burden demonstrating prejudice. The language of the statute makes the granting of such relief within the trial court's discretion. §631(g) Prejudice to the parties is one of the factors the trial court may consider exercising that discretion. *Gann*, 231 Cal.App.3d at 1704. There was no prejudice in granting Petitioner a jury trial even just by March 2021.

Petitioner also established the trial court abused its discretion. Petitioner bears the burden of affirmatively demonstrating error by the trial court and did so. *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*). Accordingly Petitioner offered evidence of payment of her jury fees, and the ex-parte applications in the record establishing the trial court abused its discretion denying any relief from jury trial waiver.

B. An Important Question Exists Whether Petitioner's Due Process Rights Were Violated When The Trial Court Prevented Petitioner From A Fair Hearing In Limiting Her Cross-Examination Of William Hendricks Illegal Conduct

The trial court's rulings regarding exclusion of William Hendricks discovery response where he admitted trafficking drugs for over five years and the Court's refusal to allow Petitioner to cross-examine him about this illegal conduct, or offer such evidence

in support of her affirmative defenses of truth and substantial truth are reversible error without any showing of prejudice because the trial court deprives the party offering the evidence of a fair hearing and of the opportunity to show actual prejudice. *Gordon v. Nissan Motor Co., Ltd.* (2009) 170 Cal.App.4th 1103, 1114 William alleged defamatory allegations that referenced criminal conduct and he testified he was not involved in a drug ring too. The Trial Court's exclusion of this evidence deprived Appellant of property without due process of law and constituted a structural error that is reversible per se. *U.S. Const., 14th Amend., §1; Cal. Const., art. I, §7(a)*. The Trial Court exceeded the bounds of reason by so limiting the use of such discovery and related testimony. *McCoy v. Pac. Mar. Ass'n*, (2013) 216 Cal.App.4th 283, 295. A miscarriage of justice should have been declared because the trial court, after an examination of the entire cause, that it was reasonably probable that a result more favorable to Petitioner as the appealing party would have been reached in the absence of the error. *People v. Watson* (1956) 46 Cal.2d 818, 836.

C. An Important Question Exists Whether Petitioner's Due Process Rights Were Violated In Limiting Cross Examination Of William Hendricks

During trial, Petitioner's counsel asked William "did you ever—ever order drugs over the internet and set the shipping address as your home in Iowa" which would establish he was in a drug ring and the Court sustained this objection on relevancy

grounds in error. Petitioner was not able to seek testimony when William first ordered drugs and why someone named Inmer picked up drugs in the rental. Petitioner was not permitted to question Roxanne Hendricks if drugs were purchased from a joint bank account nor about the device on their home computer concealing drug purchases.

During Petitioner's counsel's cross-examination of William Hendricks, the Court stopped such examination and told William to leave the witness stand when Petitioner's counsel had not completed such examination. Since right to due process requires the government to provide reasonable notice and an opportunity to be heard before depriving a person of life, liberty, or property (U.S. Const., 14th Amend., §1; Cal. Const., art. I, §7,(a), 15).

Under the single-publication rule, publication of a defamatory statement "generally is said to occur on the first general distribution of the publication to the public." *Shively v. Bozanich*, 31 Cal. 4th 1230, 1237 (2003), as modified (Dec. 22, 2003). William did not plead a theory of a foreseeable republication of statements in emails, on Twitter or Facebook. The Court stated the Twitter posts were published to Airbnb employee Sanaz Ebrahini via email but Petitioner did not republish any social media posts or emails nor is this alleged nor proven Sanaz read any post. The Court stated he testified that anyone who Googles his name can easily see the false allegations Petitioner made against him and the complaint does not allege this. The opinion omits the fact the Twitter post did not include his name and he offered no foundation why someone can google his name and

see internal Airbnb emails, and a private Facebook post where his name appeared in an image.

Truth is a complete defense against civil liability for defamation regardless of the bad faith or malicious purpose of the publisher of the material. *Washer v. Bank of America*, (1948) 87 Cal.App.2d 501. He admitted to trafficking drugs over five years thus a new trial was warranted. C.C.P. §657(6). Petitioner's counsel addressed the trial court of the need to question William about his April 2020 discovery response which request was denied.

Defamation must be plead with particularity, i.e., each allegedly defamatory statement "must be specifically identified, if not pleaded verbatim, in the complaint." *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1612, fn. 5. The statement of decision describes multiple defamatory allegations not pled in the complaint. The complaint also did not allege special damages. *Skaggs v. Wiley*, 108 Cal.App. 429, 434 (1930). A general allegation of the loss of a prospective employment, sale, or profit will not suffice. *Peabody v. Barham* (1942), 52 Cal.App.2d 581, 585. The cross complaint only alleged "As a further proximate result of the above-described statements, Cross-Complainant has suffered special damages, including injury to his business reputation and the loss of current and prospective client, vendor and employment relationships." Petitioner objected to introduction of his employment history which testimony was allowed. The decision omits the fact damages for emotional harm, embarrassment or shame or damage to his recovery from drug addiction or harm on his marriage also were not alleged. (Opinion p. 48) To prevent a surprise on the

defendant, it is the general rule that the plaintiff must state in his complaint the particular damage which he has sustained, or he will not be permitted to give evidence of it. *Skaggs v. Wiley (1930)*, 108 Cal.App. 429, 434.

The Trial Court granted \$800,000 in compensatory damages with no explanation of general and special damages when special damages were not pled (*Pollard v. Lyon*, 91 U.S. 225, 237) and for multiple statements not alleged in the complaint. *Kahn v. Bower (1991)* 232 Cal.App.3d 1599, 1612, fn. 5.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Date: December 11, 2023

Respectfully submitted,

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APPENDIX

U.S. Const. amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., 14th Amend., §1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.